In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2003

SPIEGEL, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45-59) is reported at 494 F. 2d 59. The decision of the Federal Trade Commission (Pet. App. 1-23) is reported at 82 FTC 20.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1974, and a timely petition for rehear-

ing and suggestion for rehearing *en banc* was denied on April 16, 1974 (Pet. App. 60). The petition for a writ of certiorari was filed on July 9, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission properly concluded that the offer by a retailer of merchandise from a catalogue on a free-trial or other basis without clearly disclosing conditions or restrictions attached to the offer, had sufficient public impact to warrant a cease-and-direct order.
2. Whether the Commission's cease-and-desist order is reasonably related to the unlawful practices found and sufficiently specific.

STATUTE INVOLVED

Sections 5(a)(1) and 5(b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45(a)(1), (b), are set forth in the petition (p. 3).

STATEMENT

The facts found by the Commission are not in dispute. Through a catalogue, petitioner sells clothing, household appliances, kitchenware, and similar merchandise, most of its business being in interstate commerce (Pet. App. 10). For some years, its merchandising methods have included offers of goods, through direct mail and newspaper distribution, on a "free trial" basis or on a discount ("percent off")

basis.[1] Net sales generated by these offers were substantial—approximately $27 million both in 1969 and 1970, and $30 million in 1971 (Pet. App. 16). These offers were distributed both to those who were already credit customers of Spiegel and to prospective credit customers (Pet. App. 13-14).

Petitioner did not send merchandise to established credit customers who ordered it pursuant to these offers, however, unless four conditions were met: (1) the purchase price of the order, added to outstanding extensions of credit, was within the customer's credit limit; (2) payment on his account was current; (3) payments had been on time in the past; and (4) his account had been used within the past twelve months (Pet. App. 14-15, 17). Petitioner did not send ordered merchandise to those who had no previous credit account unless they completed a questionnaire included with the order form and petitioner approved extension of credit to them (Pet. App. 14).

Prior to the issuance of the Commission's complaint, petitioner did not disclose these conditions. Its catalogue and other advertising used only language such as "all orders are subject to acceptance by Spiegel." After the Commission issued its complaint, such language was changed to read "all orders subject to Spiegel's credit approval" (Pet. App. 13-16, 34-36, 42-44). These statements appeared in small

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[1] Petitioner has stated that the discount offer has not been used since 1970, as it was unprofitable (Pet. App. 32-33).

type, although the catalogues included in boldface on their covers the statements "30 Day Free Trial" and "Send No Money" (Pet. App. 43).

The Commission concluded that the advertising challenged in the complaint had the capacity and tendency to mislead the consumer, that it was inherently unfair, even if those seeking to take advantage of the offers were not injured economically by the deception, and that this failure to make adequate disclosure was an unfair method of competition prohibited by Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) (Pet. App. 18).

On petition for review, the court of appeals affirmed and enforced the order (Pet. App. 45-54). The court rejected petitioner's contention that the Commission's concern with truthful advertising was "too trivial for Commission attention" because the proof in this case did not show injury to the public or to competition (Pet. App. 48-50). It held that the Commission's order was supported by substantial evidence (Pet. App. 51-52), was neither vague nor overly broad (Pet. App. 52), and would not injure the public by ending free-trial offers (Pet. App. 53).[2]

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[2] The court also rejected petitioner's contentions that there was a prejudicial variance between the complaint's allegations that the conditions to the offer were unstated, and the ultimate finding that they were insufficiently disclosed (Pet. App. 52), and that petitioner should have been allowed, by third-party subpoenas, to show that its competitors were engaged in similar or worse violations (Pet. App. 53-54).

ARGUMENT

Petitioner principally contends (1) that any deception was so "trivial" that the issuance of an order was not in the public interest and (2) that the Commission's order is vague and excessively broad. The court of appeals correctly rejected both contentions and no further review by this Court is warranted.

1. The Commission exercises a broad discretion in determining whether a proposed proceeding will be in the public interest (15 U.S.C. 45(b)), and this Court has long recognized the Commission's responsibility to assure truthfulness in advertising. *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 28; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 387-390. *See also Floersheim* v. *Federal Trade Commission*, 411 F. 2d 874, 878 (C.A. 9); *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F. 2d 869, 873 (C.A. 2), certiorari denied, 370 U.S. 917; *Slough* v. *Federal Trade Commission*, 396 F. 2d 870, 872 (C.A. 5), certiorari denied, 393 U.S. 980. In view of the public interest in truthful advertising practices and the substantial volume of business involved in petitioner's free trial orders (see p. 3, *supra*), the court of appeals correctly concluded that in this case the Commission "did not waste its time with trivia * * *" (Pet. App. 50).

Petitioner contends that the Commission's order will curtail sharply, if not eliminate, the use of free trial offers. The assessment of the effects of deceptive advertising required by Section 5 "rests * * * heavily

on inference and pragmatic judgment" based on "enlightment gained from administrative experience." *Federal Trade Commission* v. *Colgate-Palmolive Co., supra*, 380 U.S. at 385. Deception for the sake of attracting customers is still deception, even if the customer is not demonstrably injured. *Id.* at 388-389; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78.

The court of appeals in the present case properly concluded (Pet. App. 50):

> [T]he promise of an unconditional "free trial" or "percent off," when both are conditional, is not in the public interest. A good society depends upon promises being kept. And individuals in society have a right to be told the truth, so that their choices among products, or, as in this case, among offers, can be understandingly made.

Spiegel urges that the offers were not in fact advertised as unconditional. But, as the court of appeals noted, the violation found by the Commission was not that conditions were completely unstated but that they "were not stated or located in such a way that customers, without undue difficulty, would understand" them (Pet. App. 51). "The important criterion is the net impression which the advertisement is likely to make upon the general populace." *Charles of the Ritz Distribs. Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679-680 (C.A. 2); see *Ward Labs., Inc.* v. *Federal Trade Commission*, 276 F. 2d 952, 954 (C.A. 2), certiorari denied, 364 U.S. 827. The court below, after reviewing the advertise-

ments in question, held that the Commission's finding of a capacity and tendency to deceive was supported by substantial evidence (Pet. App. 51-52).

With respect to the wording of the conditions that the advertised offers did contain, petitioner blurs the distinction between the practices before and after issuance of the Commission's complaint. Prior to the issuance of the complaint, the language simply indicated that all orders were subject to petitioner's approval or acceptance, without express mention of credit. Whether the references to "credit approval" added after the issuance of the complaint, if properly and prominently displayed, will partially comply with the Commission's order is a matter for determination under Commission compliance procedures; but it is well-established that even complete discontinuance or abandonment of an unfair trade practice after issuance of a complaint does not make issuance of a cease-and-desist order improper. *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F. 2d 313, 322 (C.A. 8), certiorari denied, 384 U.S. 939.

2. The court of appeals properly found that the order is reasonably related to the unlawful practices found to exist and is not too vague or ambiguous.

The order (Pet. App. 20-21) contains four paragraphs. Paragraph 1 requires that offers to *prospective* credit customers of a "free trial" or "percentage off" the price of merchandise "clearly and conspicuously disclose * * * in immediate conjunction with such offer that it is subject to * * * [petitioner's] credit approval." Paragraph 2 provides that

"free trial" offers to *established* credit customers must similarly disclose "any credit restriction or condition which would make a customer ineligible" for the offer, "or any other restriction or condition applicable to such offer." Paragraph 3 requires, as to *prospective* credit customers, that the order blank questionnaire for a "free trial offer or other offer" disclose "at the top" that it is "an application for credit" and that the order will be filled only if the customer is approved for credit. Paragraph 4 prohibits petitioner from representing that an offer is available without conditions when such offer is in fact conditional. All of these paragraphs are directly responsive to deficiencies found by the Commission (Pet. App. 16-18) in the disclosure of credit-approval conditions on petitioner's offers.

Paragraph 4, which petitioner especially attacks, is designed "to close all roads to the prohibited goal * * *." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. Petitioner's reliance on *Federal Trade Commission* v. *Colgate-Palmolive Co., supra,* in claiming that paragraph 4 is over-broad, is misplaced, in view of the similarity between the order approved there (see 380 U.S. at 382, 394-395) and paragraph 4. Neither order limits its prohibition to repetition of the specific violation found; rather the scope is broad enough to bar the general type of practice for which the violators have shown a predilection. In *Colgate-Palmolive* it was not just simulation of sandpaper that had to be stopped but misrepresentations that viewers were seeing a test of a

product. Here, it is not just a credit approval condition that must be stated, but any condition that limits the availability of an offer.

The strictures petitioner must observe are clear enough. But, as this Court said in *Colgate-Palmolive*, if petitioner should genuinely doubt whether a proposed course of action will violate the order, it may "oblige the Commission to give * * * definitive advice as to whether * * * [a] proposed action, if pursued, would constitute compliance * * *" (380 U.S. at 394), by invoking the Commission's rule providing for such advice. 16 C.F.R. 3.61(d).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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